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IN THE SUPREME COURT

OF THE UNITED STATES

October Term, 1992

CITY OF YOUNGSTOWN, ET AL.

PETITIONERS

v.

BARBARA MARTIN

RESPONDENT

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

1. Whether a United States Court of Appeals may, in a sex harassment case where all facts were disputed either as to their very existence or the inferences to be drawn from them, make its own determination as to the credibility of the witnesses and usurp the jury's role in the district court.

2. Whether a district court decision not to grant a new trial in a sex harassment case where the jury found that plaintiff was not harassed is entitled to due deference on review by the United States Court of Appeals.

3. Whether a United States Court of Appeals, in review of a district court determination not to grant a new trial to plaintiff in a sex harassment case, may instead review the underlying jury verdict and reverse the underlying verdict in its entirety.

LIST OF OTHER INTERESTED PARTIES

None.

TABLE OF CONTENTS

Title	Page
QUESTIONS PRESENTED FOR REVIEW	i
LIST OF OTHER INTERESTED PARTIES . . .	ii
TABLE OF AUTHORITIES	iv
JURISDICTION	1
CITATION OF FEDERAL LAWS INVOLVED . .	3
STATEMENT OF THE CASE	6
ARGUMENT	22
CONCLUSION	52
APPENDIX	
U. S. Court of Appeals for the Sixth Circuit, Order, dated July 13, 1992	1
U. S. Court of Appeals for the Sixth Circuit, dated April 28, 1992	4
U. S. District Court, Opinion and Judgment Entry, dated March 5, 1991	29

TABLE OF AUTHORITIES

Cases	Page
Anderson v. Bessemer City, 470 U. S. 564, 105 S. Ct. 1504, 84 L. Ed. 2d 518 (1985) . .	31,44
Bruner v. Dunaway, 684 F. 2d 422 (6th Cir. 1982)	43
Campbell v. American Foreign S. S. Corp., 116 F. 2d 962 (2d Cir. 1941)	44
Grimm v. Leinart, 705 F. 2d 179, (6th Cir. 1983), cert. den., 465 U. S. 1066, 104 S. Ct. 1415, 79 L. Ed. 2d 741 (1984)	25
King v. Love, 766 F. 2d 962, (6th Cir.), cert. den., 474 U. S. 971 (1985)	18,23 25
Pratt v. National Distillers and Chemical Corp., 853 F. 2d 1329 (6th Cir. 1988)	47
Rockwell International Corp. v. Regional Emergency Medical Services, 683 F. 2d 29, (6th Cir. 1982)	24
Sterling v. Velsicol Chemical Corp., 855 F. 2d 1188, (6th Cir. 1988)	49
TCP Industries v. Uniroyal, 661 F. 2d 542 (6th Cir. 1981)	26,28, 29,30, 41

TABLE OF AUTHORITIES

Cases	Page
Tennant v. Peoria and Pekin Railroad Co., 321 U. S. 29, 88 L. Ed. 2d 520, 64 S. Ct. 409 (1944)	28,42
United States v. Oregon State Medical Society, 343 U. S. 326, 72 S. Ct. 690, 96 L. Ed. 978 (1952)	48
United States v. United States Gypsum Co., 333 U. S. 364, 68 S. Ct. 525, 92 L. Ed. 746 (1948) . .	32,48
United States v. Yellow Cab Co., 338 U. S. 338, 70 S. Ct. 177, 94 L. Ed. 150 (1949)	32,48
Wrenn v. Gould, 808 F. 2d 493 (6th Cir. 1987), 470 U. S. 564, 84 L. Ed. 2d 518, (1988)	45
Yates v. Avco Corp., 819 F. 2d 630 (6th Cir. 1987)	17,44, 45

OTHER AUTHORITIES

Federal Rules of Civil Procedure, Rule 52(a)	42

JURISDICTION

The Sixth Circuit Court of Appeals ruled on April 28, 1992, to reverse the jury verdict and the District Court's denial of back pay, to remand to the court for calculation of Plaintiff's damages and to affirm the court's judgment against Defendant on the retaliation charges and the remedies fashioned by the court.

The Sixth Circuit filed on July 13, 1992, but failed to issue as a mandate until July 21, 1992, an Order denying Defendant's request for rehearing and rehearing en banc. The Court did, however, acknowledge within the Order that it incorrectly cited the standard of review and purported to correct this mistake.

There is no cross-petition for writ of certiorari to date.

This honorable Court has jurisdiction to review the judgments and orders of the Court of Appeals as that court has decided the matter herein in a manner which conflicts with previous decisions of this honorable Court and has so far departed from the accepted and usual course of judicial proceedings that their decision calls for an exercise of this Court's powers of supervision. All jury verdicts, at least those which rule in a currently unpopular manner, are now subject to reversal by an appellate court willing to make credibility determinations. The Sixth Circuit reversal of a jury verdict on review of a district court denial of new trial based on the reviewing court's determination of fact and credibility of witnesses is potentially cataclysmic to those within the Sixth Circuit's jurisdiction.

FEDERAL LAWS INVOLVED

42 USC Section 1983:

Civil action for deprivation of rights

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress....

42 USC Section 2000e - 2(a):

Unlawful employment practices

(a) **Employer practices.** It shall be an unlawful employment practice for an employer -

(1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin; or

(2) to limit, segregate, or classify his employees or applicants for employment in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's race, color, religion, sex, or national origin.

42 USC Section 2000e - 3(a):

Other unlawful employment practices

(a) **Discrimination for making charges, testifying, assisting, or participating in enforcement proceedings.** It shall be an unlawful employment practice for an employer to discriminate against any of his employees or applicants for employment, for an employment agency, or joint labor-management committee controlling apprenticeship or other training or retraining, including on-the-job training programs, to discriminate against any individual, or for a labor organization to discriminate against any member thereof or applicant for membership, because he has opposed any practice made an unlawful employment practice by this title [42 USCS Sections 2000e - 2000e-17], or because he has made a charge, testified,

assisted, or participated in any manner in an investiga-tion, proceeding, or hearing under this title 42 USCS Sections 2000e - 2000e-17].

STATEMENT OF THE CASE

Plaintiff Barbara Martin was hired by the City of Youngstown as its first woman Waste Water Treatment Plant Operator in January 1988, T. 206. She was hired in this capacity after being aided by the Defendant's Superintendent, Thomas Cardarelli, as to the prerequisites for civil service and waste water treatment employment, T. 50, 217-219, 51 and 220, despite the fact that she only placed twelfth on the eligibility list, T. 220. Even though a civil service employee in her probationary period may be fired for any reason or none, the City kept Martin on at the plant. In fact, her supervisor gave her a certificate of congratulations upon her completion of the probationary period, T. 240.

As she was the very first woman Plant Operator, certain unexpected accommodations needed to be made. Martin's uniform, the smallest size available, was ill-fitting and the City needed to and did order her a special size, which took some time to arrive, T. 207-208. No special women's locker rooms were available in the City's ancient facilities. Certain accommodations were made for her at the existing plant and once the new secondary treatment facility was completed in the spring of 1988, T. 62-63, at Martin's request a new locker room assignment was made her in the new buildings.

At first, Martin got along well with supervisors and co-workers. Martin was trained in her duties by them, T. 63-64, attended her supervisor's birthday party at which she brought the cake, T. 806 and

Defendant's Exhibit AA-D, and went out for drinks with them and her fiance to celebrate her approaching wedding, T. 304 and 826. They, in fact, attended her wedding, T. 812.

Martin entered the work place with personal problems, however. In February 1986, while attending the waste water training classes Cardarelli directed her to, her mother committed suicide, T. 214. Martin, the only women operator at the plant, remarried in the summer of 1988, T. 97, acquiring two teenage stepsons, T. 211, one of whom did not accept her, T. 212. Her daughter began stealing from her and her new husband, T. 216. In September of 1988, she discovered a lump and infection in her breast that her doctor had trouble diagnosing, or ruling out, as cancerous, T. 11. Martin's ex-sister-in-law was raped by her ex-husband, a fact which Martin openly

discussed at work, T. 141-142. To top it all off, when Martin took the state licensing exam in October of 1988, a license she needed to gain in order to keep her job at the plant and which was one of a series of licenses mandatory for promotion, she failed the exam, T. 204, and was facing certain termination. Not only did Martin refuse to retake the test, T. 204, she testified under oath three separate times that she never planned to take the test again, T. 295. Again, failure to obtain the license would result in termination.

At some point in her Waste Water Treatment Plant employment, her relationships with her supervisors and co-workers soured. She claimed in uncorroborated testimony that she began to be sexually harassed as early as February, one month after beginning. Yet she waited

until September, an additional seven months and months after her personal problems began, to complain to a manager, T. 125. She never personally complained of this to the Superintendent, even though she knew she could drop by his office at any time to gain access to him and, in fact, had done so a few times even prior to her employment at all, T. 217.

Instead, after failing the licensing exam, Martin went to a lawyer who contacted the City's Human Relations Officer. This officer began discussions and meetings between Martin, her lawyer and the Plant Superintendent and managers. Martin failed to contact Human Relations at any time prior to this, despite the fact that she contacted this office even prior to her employment to complain that she was not being hired fast enough, T. 55-56. The result of these

meetings was that Martin requested to be transferred from her initially-assigned shift, T. 115, 146 and 149. She specified the shift change she wanted, T. 318, making the demand personally several times, T. 158-159. Martin's shift was changed exactly as she requested, T. 160, 318-319. Martin stated at trial that once this change was made, everything was "fine," T. 321, L. 25. Despite this, she left work and has yet to return.

Martin sued the City in the United States District Court for the Northern District of Ohio, Eastern Division, December 1989, for both Title VII retaliation and 42 U.S.C. Section 1983 violations after filing with the Equal Employment Opportunity Commission in January of 1989. The complaint was later amended in April to include sex harassment and retaliation claims.

All claims went to trial which commenced November 14, 1990. The jury was to determine the Section 1983/sex harassment issues, as these were intertwined. The District Court reserved to itself the Title VII claims. Both were tried together. At no time did any party file motions for summary judgment. At no time did Martin request a directed verdict. It was acknowledged by all parties and the trial judge, who overruled the City's request for directed verdict on only the Section 1983 claims, that there were absolutely no undisputed factual issues. At trial it became clear that all matters of fact were in dispute, either as to their very existence or as to the inferences which may be drawn from them.

The City of Youngstown presented a number of witnesses who each testified that

either the alleged incidents did not occur at all or did not occur in the manner Martin described. Martin had only two witnesses who testified as to the alleged harassment: herself and an employee who admitted on the stand that he had been fired by the City for making racial slurs.

At the end of the trial, the jury was presented with a series of interrogatories designed to narrowly interpret the jury's verdict. If any question was answered in the negative, the jury's duty was finished. Martin at no time objected to these interrogatories either as to their content or language. The jury answered "no" to the very first interrogatory, which was:

> Has Plaintiff Barbara Martin proved by a preponderance of the evidence that she was subjected to unwelcomed sexual harassment at the place of her employment in the form of sexual advances, requests

> for sexual favors or other verbal or physical conduct of a sexual nature when viewed from the perspective of a reasonable person?

The district court ruled on March 5, 1981, following briefs by the parties, it was estopped by the jury verdict in favor of the City from ruling on Martin's Title VII harassment claims. The district court ruled, however, that Martin was retaliated against in violation of Title VII based on her transfer to a new crew and on the testimony of an employee fired by the City that other workers were told not to speak to Martin.

Martin did not ask the district court for a Judgment N. O. V. Instead, she filed a motion for new trial. This motion centered around Martin's claims that the jury verdict was against the weight of the

evidence. The District Court ruled, however, at pages 4-5 of its Memorandum Opinion:

> Testimony was presented, if believed by the jurors, that justified the jury's negative response to the first interrogatory. Credibility of the witnesses was an issue for the jurors. They resolved the credibility of the witnesses to the detriment of the plaintiff. The issue is not whether the Court would have decided the case differently, but whether there was evidence upon which the jury could base its [negative] answer to the first interrogatory. The Court finds that there was such evidence. The claim that the jury's answer to the interrogatory was against the manifest weight of the evidence is without merit, (emphasis added).

Both parties appealed to the Sixth Circuit. In her briefs, Martin's counsel many, many times misstated and exaggerated the evidence presented at trial. She made wild accusations in her briefs which were

completely and totally unrelated to the actual cited testimony, as could be easily seen by simply turning to the transcript pages cited by her. At oral argument, however, the panel's questions to both counsel were phrased in such a manner as to make it abundantly clear that the panel believed Martin's allegations and her interpretation of the evidence. Despite the fact that the panel was reminded several times that the jury, whose job was to weigh the evidence and the credibility of the witnesses, had found that Martin was <u>not</u> sexually harassed as she alleged, every question and comment by the panel assumed that harassment did, in fact, occur and Martin's allegations were true. Judge Martin went so far as to tell an astounded counsel for the City that the holding of a

case this counsel relied on was diametrically opposite to the stated holding. Martin wrote the opinion of the case, Yates v Avco Corp., 819 F. 2d 630 (6th Cir. 1987). His memory was not refreshed even when counsel read the holding from the photocopy she held in her hand.

The panel ruled, not surprisingly, on April 28, 1992, that the jury verdict should be reversed, and the case remanded on the issue of damages and that the remainder of the verdict, in Title VII retaliation, would be affirmed. They mandated a complete reversal of the jury, apparently forgetting that 1) their role was to determine whether the District Court erred in not awarding a new trial, and 2) that Martin herself only asked she be given a new trial. In reversing the jury verdict, the panel

specifically cited to various selected allegations made by Martin (all of which were disputed by the City), ignored conflicting evidence presented by the City, and held that the appropriate standard of review was cited in King v. Love, 766 F. 2d 962, 969 (6th Cir.), cert.den., 474 U. S. 971 (1985).

As the King decision set out the standard on review of a directed verdict by a trial judge, and as the panel had completely misinterpreted their role in review of this case, the City asked the Sixth Circuit to rehear the case en banc. On July 21, 1992, the Court issued its mandate on this request. Less than a majority of the entire Court voted to rehear the matter, and the City's request for rehearing en banc was denied. Recognizing that they had indeed used the wrong standard

on review, however, the original panel decided to "correct itself," cite to the correct standard on review, but refused to review the case and denied the City's petition. In effect, the panel recognized they had made a mistake but instead of undertaking a review of their original decision to determine the real effect of this mistake, they paid lip service alone to the correct legal standard by merely substituting in their flawed opinion one case name for another. The Court of Appeals in reversing the jury verdict instead of reviewing the district court's new trial ruling, has made a currently popular decision but not a lawful one. The Sixth Circuit has informed all Defendants merely accused of sex harassment not to bother putting forth a defense, not to bother with

the expense in both time and money of a jury trial. The Sixth Circuit is telling all potential defendants - all cities, counties, companies large and small - that no matter what facts twelve men and women find and no matter how they rule, the Sixth Circuit is sensitive to the politically-correct view of an issue and will do that which is popular. The Sixth Circuit will reverse an unpopular jury verdict even though this was not plaintiff's requested remedy and even though a district court has determined the jury verdict should stand.

The City of Youngstown now requests this honorable Court that it accept certification of this case to put the Sixth Circuit back in line with the rest of the nation in the matter of their role on appeal. No appellate court may usurp the

factfinder's role, even if the factfinder has made a decision not currently popular. In the alternative, the City respectfully requests this honorable Court accept jurisdiction if even for the limited purpose of limiting the appellate court's relief to that of a grant to Plaintiff of a new trial instead of complete reversal.

ARGUMENT

I. WHETHER A UNITED STATES COURT OF APPEALS MAY, IN A SEX HARASSMENT CASE WHERE ALL FACTS WERE DISPUTED EITHER AS TO THEIR VERY EXISTENCE OR THE INFERENCES TO BE DRAWN FROM THEM, MAKE ITS OWN DETERMINATION AS TO THE CREDIBILITY OF THE WITNESSES AND USURP THE JURY'S ROLE IN THE DISTRICT COURT.

The Court of Appeals for the Sixth Circuit was asked by both Plaintiff Martin and Defendant City to review the District Court decision in this matter. Plaintiff asked that the Court of Appeals review the lower court's determination that she was not entitled to a new trial and asked that the appellate panel reverse the district court and grant her a new trial. Instead of so doing, the panel chose to reweigh the evidence, a choice that necessarily would involve credibility determinations since this is a sex harassment case which revolves

exclusively around credibility. The panel, explicitly relying on King v Love, 766 F. 2d 962 (6th Cir.), cert. denied, 474 U. S. 971 (1985), and relying on three pages of Plaintiff allegations, held that,

> "... the undisputed evidence in this case should have resulted in a verdict for [Plaintiff] Martin." Opinion of April 28, 1992, page 6.

The panel then proceeded to award her, not a new trial, but complete reversal of the jury verdict, remanding only for a determination of damages awardable after this reversal.

The panel, in partially citing to the standard of review found in King v. Love, supra, erroneously relied on the standard of appellate review used to determine whether directed verdict is proper. As a jury may only receive a case when there is a dispute over factual issues, and a directed verdict

is only to be utilized where there are no issues of controverted fact, this erroneous standard of review resulted in a conflict among both Supreme Court and Sixth Circuit decisions.

A directed verdict can be easily analogized to a grant of summary judgment. When a district court grants a party a directed verdict, it means that, "there is a complete absence of pleading or proof on an issue or issues material to the cause of action or where there are no controverted issues of fact upon which reasonable men could differ," Rockwell International Corp. v. Regional Emergency Medical Services, 683 F. 2d 29, 31 (6th Cir. 1982) (emphasis added). Just as in a motion for summary judgment, a district court judge must view the evidence and the inferences which may

be drawn from that evidence in the light most favorable to the non-moving party, Grimm v. Leinart, 705 F. 2d 179, 181 (6th Cir. 1983), cert. den., 465 U. S. 1066, 104 S. Ct. 1415, 79 L. Ed. 2d 741 (1984). If the above test for directed verdict is not met, then the case must be sent to a jury.

The panel's reliance on King v Love was clear error which should have resulted in the court undertaking a new review of the matter. The entire quoted standard in King sets out the two-prong test necessary, as previously discussed, and states that a court may not reverse the district court absent both prongs of this test: that the evidence as a whole be reviewed in the light most favorable to the non-moving party and that it be granted only where there are no uncontroverted issues of fact upon which

reasonable minds could differ. The panel erred not only in relying on this case, but in that they also incorrectly cite the standard. The case in its entirety must reveal no uncontroverted issues of fact. Most definitely, that is not the case here presented. The district court alluded to this both in its denial of the City's request for directed verdict and again in its Memorandum Opinion when the Court stated that this case has been "hotly contested" from the outset.

Recognizing their undisputable error, the panel issued its Order of July 21, 1992, purporting to correct itself. The Court states:

> We may reverse the district court's ruling only for an abuse of discretion. TCP Industries v. Uniroyal, 661 F. 2d 542, 546 (6th Cir. 1981).

The Court goes on to state, however,

> In light of those undisputed facts which we have outlined in the original opinion, this Court holds that the jury verdict was against the manifest weight of the evidence and the district court abused its discretion in denying plaintiff's motion for a new trial.

Order of July 13, 1992, issued July 21, 1992.

Clear within this second order are 1) the Court is still undertaking a review of the facts which, in this sex harassment case, involves exclusively a credibility determination, and 2) the court states Plaintiff was entitled to one remedy (new trial), but still grants her another (flat reversal in her favor).

That the appellate panel is merely paying lip service to the correct standard on review is immediately apparent. The

court in TCP Industries quotes extensively at 661 F. 2d 546 from other leading cases regarding the district court and its role when a new trial is requested:

> In ruling upon a motion for a new trial based on the ground that the verdict is against the weight of the evidence, a district judge must compare the opposing proofs and weigh the evidence (Felton v. Spiro, 89 F. 576 (6th Cir. 1897)(Taft, J.), General American Life Ins. Co. v. Central Nat'l Bank, 136 F. 2d 821 (6th Cir. 1943), and "it is the duty of the judge to set aside the verdict and grant a new trial, if he is of the opinion that the verdict is against the clear weight of the evidence ***.
>
> * * * * *
>
> "[C]ourts are not free to reweigh the evidence and set aside the jury verdicts merely because the jury could have drawn different inferences or conclusions or because judges feel that other results are more reasonable." Tenant v. Peoria & P. U. Ry. Co., 321 U. S. 29, 35, 64 S. Ct. 409, 412, 88 L. Ed. 520 (1944); Werthan Bag Corp. v.

> Agnew, 202 F. 2d 119, 122 (6th Cir. 1953). Thus, while the district judge has a duty to intervene in appropriate cases, the jury's verdict should be accepted if it is one which could reasonably have been reached.

The court in TCP Industries also delves into the appellate role at page 546,

> With respect to the applicable scope of review of a District Court decision granting or denying a new trial on the basis of the weight of the evidence, it is well settled that reversal may be predicated only upon an abuse of discretion. Duncan v. Duncan, 377 F. 2d 49, 52, 53 (6th Cir.), cert. denied, 389 U. S. 913, 88 S. Ct. 239, 19 L. Ed. 2d 260 (1967) (citations omitted).

That this "abuse of discretion" standard should not and cannot involve the Court of Appeals in determinations as to which witness was telling the truth should have also been immediately apparent to the panel herein. In the very case cited by the

panel, TCP Industries, Defendant Uniroyal was asking the court for a new trial based on Uniroyal's view of the facts. The court stated the entire dispute revolved around whether the jury believed plaintiff's one witness or the testimony offered by two of the defendant's witnesses. The court held that:

> We agree with the District Judge's conclusion that the question depended upon which witness the jury believed. We cannot say that such conclusion was insupportable, resulted in a miscarriage of justice, or that the District Judge abused his discretion in so ruling, 661 F. 2d at 547.

In the district judge's review of the evidence for Martin's request for new trial, the Court holds at pages 4 and 5 of its Memorandum Opinion:

> Testimony was presented, if believed by the jurors, that justified the jury's negative response to the first interrogatory. Credibility of

> the witness was an issue for the jurors. They resolved the credibility of the witnesses to the detriment of the plaintiff. The issue is not whether the Court would have decided the case differently, but whether there was evidence upon which the jury could base its [negative] answer to the first interrogatory. The Court finds that there was such evidence. The claim that the jury's answer to the interrogatory was against the manifest weight of the evidence is without merit, (emphasis added).

In Anderson v. Bessemer City, 470 U. S. 564, 574, 84 L. Ed. 2d 518, 528, 105 S. Ct. 1504 (1985), this honorable Court overturned a court of appeals reversal in a sex discrimination appeal. There, a district court made findings, not a jury. The Fourth Circuit Court of Appeals reversed. The Supreme Court held that the court of appeals misunderstood its duties in review. The Court first states that, as a finding of intentional discrimination is a finding of

fact, Federal Rule of Civil Procedure 52(a) applies. This Rule states, "Findings of fact shall not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the trial court to judge of the credibility of the witnesses." This honorable Court, in citing to United States v. United States Gypsum Co., 333 U. S. 364, 68 S. Ct. 525, 92 L. Ed. 746 (1948) and United States v. Yellow Cab Co., 338 U. S. 338, 70 S. Ct. 177, 94 L. Ed. 150 (1949), held that if the court's interpretation of the evidence is at all,

> Plausible in light of the record viewed in its entirety, the court of appeals may not reverse it even though convinced that had it been sitting as the trier of fact, it would have weighed the evidence differently. Where there are two permissible views of the evidence, the factfinder's choice between them cannot be clearly erroneous, (citations omitted and emphasis added).

The Court goes on to highlight the Rule's specific mandate that great deference is to be paid to the trier-of-fact's credibility determinations, stating that, "only the trial judge can be aware of the variations in demeanor and tone of voice that bear so heavily on the listener's understanding of and belief in what is said," 470 U. S. 564, 575, 84 L. Ed. 2d 518, 529.

The panel provides its own proof that it failed to adhere to this standard and failed to view the evidence in its entirety. Beginning at page 2 of its April 28, 1992, Order, the Court states a recitation of what the panel believes the "facts" to be. From the last sentence of the third paragraph on this page through the first lines on page 5 of the Order, the Court lists only Martin's

allegations; Martin's version of what happened to her, how it happened and why. The panel calls these "uncontroverted facts." The panel fails to discuss the City's opposing facts. The panel fails to discuss the City's rebuttal of these allegations. The panel, first and foremost, fails to acknowledge that in a sex harassment case where it is unlikely that a plaintiff will present substantiating witnesses, the entire case revolves solely around which witness was more credible; who is telling the truth. Even the district court herein remarked on the fact that this case has been "hotly contested" by the parties from the outset. Each and every piece of evidence offered at trial was disputed by the parties either as to its very existence or as to the inferences which

should be drawn from the evidence. There was no "uncontroverted evidence." Plaintiff's sole corroborating witness, a witness who merely said he heard rumors spread about Plaintiff and was told not to talk to her, was fired sometime earlier by the City for making racial remarks. It is likely the jury found his testimony incredible. It is apparent from their verdict that this jury of both men and women jointly chosen by the parties found Plaintiff's testimony incredible.

Martin's theory and the inferences she attempted to have drawn from the evidence was that she was the innocent and unwilling victim of the most heinous kind of sex harassment. Indeed, looking at the allegations she makes simply written on the printed page, she makes a compelling

argument. It was apparent, first from the questions raised by the panel in oral argument and the way these were phrased and later from the decisions herein, the panel believed Martin's theory of this case. Unfortunately, the jury did not. The jury, after sitting for several days and observing and listening to not only the City's witnesses but rather lengthy testimony from Martin herself, believed the City's theory of this case - that the behavior which was complained about largely did not occur at all and any behaviors which did occur, like the change in Martin's locker facilities, occurred solely because Martin asked that these things be done. Further, the City presented to the jury a picture of a plaintiff who was under a great deal of personal stress and who was desperately

unsure just how she should behave with "the guys" and a plaintiff who was facing certain termination. A review of the panel decision, which purports to rely on uncontroverted facts, shows that the panel believed Martin's allegations in total and assigned their own inferences and weight to Plaintiff's testimony and Plaintiff's allegations. Likewise, it is apparent the panel dismissed in total Defendant's theory of the case and the credibility of Defendant's witnesses.

To allow this appellate circuit or any other to begin making credibility determinations is to invite and create chaos in the appellate courts. Not only does this action by the Sixth Circuit run against the steady stream of this honorable Court's and the Circuit's own decisions which makes up a

body of heretofore settled law, but this action by the panel completely upsets the very foundation of our jurisprudence. The right to a jury, and that jury's verdict, are virtually sacrosanct. Once a jury of our peers renders a verdict, it should not be disturbed absent exceptional circumstances. The Sixth Circuit usurped the jury's duty. The Sixth Circuit, who did not sit through several days of trial, did not see or hear the witnesses demeanor, did not view the evidence (an important part of which was a videotape showing Plaintiff at a party with her male co-workers exchanging sexual banter after she denied socializing with any of them, Defendant's Exhibit AA-D) now attempts to reweigh the evidence and assign its own weight to those witness statements. It is not only against the

settled body of law, it is absurd. As such, it calls for this Court's superintendence to correct this error.

II. WHETHER A DISTRICT COURT DECISION NOT TO GRANT A NEW TRIAL IN A SEX HARASSMENT CASE WHERE THE JURY FOUND THAT PLAINTIFF WAS NOT HARASSED IS ENTITLED TO DUE DEFERENCE ON REVIEW BY THE UNITED STATES COURT OF APPEALS.

Part and parcel of the appellate court's decision to reweigh the credibility of the evidence is its decision to disregard the district court determination that the jury verdict should be upheld and no new trial granted. The court of appeals never discussed the district judge's ruling, how it applied and why they thought it was wrong. In fact, the Sixth Circuit ignored that the district court ruled on the evidence at all.

The district court decision has been quoted herein in pertinent part at pages 6 and 13 and will not be again restated. Clear from the decision, however, is 1) the

district court weighed, and reweighed, the evidence, 2) the district judge was present at trial to observe the evidence and the demeanor of the witnesses, and 3) the court held the jury verdict was justified.

The City has already discussed the standard of review of the district court herein at Argument I. The standard for the district judge is that the verdict be accepted if it could have been reasonably reached by the jury, TCP Industries v. Uniroyal, infra, 661 F. 2d at 546. In his review of the evidence, the district judge found that the jury's verdict was "justified," Memorandum Opinion, page 4.

The panel ignored the fact that the district court weighed the evidence and found the jury verdict to be appropriate. Once this happens, the appellate panel must,

under Federal Rule 52(a), give great deference to the district court's determination. That the panel failed to do this is inconsistent with not only Supreme Court law, but also with its own previous decisions.

In the seminal case in this matter, Tennant v. Peoria and Pekin Railway Co., 321 U. S. 29, 35, 88 L. Ed. 2d 520, 525, 64 S. Ct. 409 (1944), succinctly states both the district court's role and the panel's role in this matter:

> It is not the function of a court to search the record for conflicting circumstantial evidence in order to take the case away from the jury on a theory that the proof gives equal support to inconsistent and uncertain inferences. The focal point of judicial review is the reasonableness of the particular inference or conclusion drawn by the jury. It is the jury, not the court, which is the factfinding body. It weighs the contradictory

> evidence and inferences, judges the credibility of witnesses, receives expert instructions, and draws the ultimate conclusion as to the facts. The very essence of its function is to select from among conflicting inferences and conclusions that which it considers most reasonable.
>
> . . .
>
> Courts are not free to reweigh the evidence and set aside the jury verdict merely because the jury could have drawn different inferences or conclusions or because judges feel that other results are more reasonable.

Martin herself enunciated to the Court of Appeals the appellate standard of review once a district court has ruled on a motion for a new trial: the trial court decision rests within its own sound discretion and will not be overturned by an appellate court absent clear abuse of discretion by the trial court, Bruner v. Dunaway, 684 F. 2d 422 (6th Cir. 1982), Campbell v. American

Foreign S. S. Corp., 116 F. 2d 962 (2d Cir. 1941), cert. den., 313 U. S. 573, 61 S. Ct. 959. In fact, as a member of the appellate court's own panel has held in the past, a finder of fact, in this case the jury and district court, has the best "opportunity to observe the demeanor and credibility of the witnesses ...." and these, "observations should be accorded great deference," Yates v. Avco Corp., 819 F. 2d 630, 636 (6th Cir. 1987), citing to Anderson v. Bessemer City, 470 U. S. 564, 573, 105 S. Ct. 1504, 1511, 84 L. Ed. 2d 518 (1985). In Anderson, the Court states:

> The rationale for deference to the original finder of fact is not limited to the superiority of the trial judge's position to make determinations of credibility. The trial judge's major role is the determination of fact, and with experience in fulfilling that role comes expertise. Duplication of the trial judge's efforts in

> the court of appeals would very likely contribute only negligibly to the accuracy of fact determination at a huge cost in diversion of judicial resources. In addition, the parties to a case on appeal have already been forced to concentrate their energies and resources on persuading the trial judge that their account of the facts is the correct one; requiring them to persuade three more judges at the appellate level is requiring too much. As the Court has stated in a different context, the trial on the merits should be "the 'main event' ... rather than a 'tryout on the road.'" Wainwright v Sykes, 433 US 72, 90, 53 L Ed. 2d 594, 97 S Ct 2497 (1977). For these reason, review of factual findings under the clearly-erroneous standard-with its deference to the trier of fact-is the rule, not the exception.

See also Wrenn v. Gould, 808 F. 2d 493 (6th Cir. 1987), 470 U. S. 564, 575, 84 L. Ed. 2d 528, 529 (1988).

It should not be surprising to observers of oral argument below that the panel overlooked or forgot the Yates "due deference" language, even though a member of the panel wrote the decision. In oral

argument, this panel member also insisted that the decision in the case was completely opposite, even though the City's counsel was reading the decision from a photostatic copy she was holding.

The Sixth Circuit did not give due deference to the district judge's decision not to grant a new trial. The Sixth Circuit did not discuss that decision at all. The appellate court undertook its own review of the case, made credibility determinations and found facts, taking the court completely outside of the purview of settled law and completely outside of its own bounds.

III. WHETHER A UNITED STATES COURT OF APPEALS, IN REVIEW OF A DISTRICT COURT DETERMINATION NOT TO GRANT A NEW TRIAL TO PLAINTIFF IN A SEX HARASSMENT CASE MAY INSTEAD REVIEW THE UNDERLYING JURY VERDICT AND REVERSE THE UNDERLYING VERDICT IN ITS ENTIRETY.

The jury verdict is virtually sacrosanct. The Sixth Circuit itself has stated in Pratt v. National Distillers and Chemical Corp., 853 F. 2d 1329, 1337 (6th Cir. 1988), that,

> "A reviewing court should be particularly loathe to disturb a jury's findings on an issue ... which is so intimately bound to the interpretation of facts and the demeanor of witnesses" [citations omitted] .... We are not to reweigh evidence to reach our own conclusions about the correctness of a jury's decision; our task is simply to determine whether reasonable jurors could, under and theory submitted to them have resolved the dispute as they did, (emphasis added).

The district court was to undertake this review, which, of necessity in a sex harassment case, involved credibility determinations almost exclusively. Once the district court undertook this review, his determination was/is entitled to due deference. If, however, the appellate court chooses to review the jury verdict, this, then, is the standard of review the panel should have adopted and adhered to: in light of all of the evidence found in the record, was there any way at all; any theory at all, under which the jury could have reached the conclusion it did, United States v. Oregon State Medical Society, 343 U. S. 326, 339, 72 S. Ct. 690, 698, 96 L. Ed. 978 (1952), United States v. United States Gypsum Co., 333 U. S. 364, 395 68 S. Ct. 525, 541, 92 L. Ed. 746 (1948), United States v. Yellow Cab

Co., 338 U. S. 339, 342, 70 S. Ct. 177, 179, 94 L. Ed. 150 (1949), Sterling v. Velsicol Chemical Corp., 855 F. 2d 1188, 1198 (6th Cir. 1988).

Assuming arguendo that the Sixth Circuit could have found the jury's conclusions were wrong without making credibility determinations (a clearly impossible task, here) the appellate court still gave Plaintiff the wrong remedy. Plaintiff asked for a new trial. The district court ruled against her request for new trial. The appellate court was reviewing Plaintiff's request for new trial. Yet the court of appeals, after reweighing the evidence, determining credibility issues and failing to give the district judge due deference, reverses the jury verdict in its entirety. The appellate court goes beyond

just ruling in Plaintiff's favor and granting a new trial. The panel goes further than just usurping the jury's factfinding authority. The panel not only substitutes its opinion of the facts for the jury's opinion, but it deprives the Defendant City of its right to a jury trial at all by flatly reversing and remanding only for calculation of damages. This act, in and of itself, is so egregious that the City would ask this honorable Court to invoke its powers of super-intendence and correct the Sixth Circuit's error, an error which harms not only Defendant City but if left unchallenged has the potential to effect all other persons who have jury verdicts favorable to themselves, especially those unpopular with the stream of current opinion. As a precedent, this is bad law.

As a policy, this goes against the grain of long-accepted jurisprudence and should not be allowed to stand.

CONCLUSION

It is necessary for this honorable Court to exercise its powers of superintendence herein as the United States Court of Appeals for the Sixth Circuit has so far departed from the accepted and usual course of judicial proceedings that their decision calls for such an exercise by the Court. Further, the decision of the appellate court conflicts with not only its own decisions but decisions of this honorable Court.

For all of the foregoing, the City of Youngstown respectfully requests this honorable Court accept certiorari herein.

This 16th day of October, 1992.

Respectfully submitted,

Cheryl L. Waite

CHERYL L. WAITE
COUNSEL FOR PETITIONER

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

BARBARA MARTIN Plaintiff-Appellant/ Cross-Appellee v. CITY OF YOUNGSTOWN, WASTE WATER TREATMENT PLANT; PATRICK UNGARO, MAYOR CITY OF YOUNGSTOWN Defendant-Appellee/ Cross-Appellants	)	ORDER

BEFORE: KEITH and MARTIN, Circuit Judges; and CELEBREZZE, Senior Circuit Judge

The court having received a petition for rehearing en banc, and the petition having been circulated not only to the original panel members but also to all other active judges of this court, and less than a majority of the judges having favored the suggestion, the petition for rehearing has been referred to the original hearing panel.

In ruling to reverse the jury verdict in this case, this Court evaluated those facts which were, in fact, uncontroverted based on our review of the record. To the extent that the Court cited the standard **King v. Love**, 766 F. 2d 962 (6th Cir.), **cert. denied**, 474 U. S. 971 (1985), as the applicable standard, we stand corrected. We may reverse the district court's ruling only for an abuse of discretion. **TCP Industries v. Uniroyal**, 661 F. 2d 542, 546 (6th Cir. 1981).

In light of those undisputed facts which we have outlined in the original opinion, this Court holds that the jury verdict was against the manifest weight of the evidence and the district court abused its discretion in denying plaintiff's motion for a new trial.

The panel has further reviewed the petition for rehearing and concludes that the issues raised in the petition were fully considered upon the original submission and decision of the case. Accordingly, the petition is denied.

ENTERED BY ORDER OF THE COURT

_____

LEONARD GREEN, CLERK

NOT FOR PUBLICATION

91-3335/3336

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

BARBARA MARTIN	)	
	)	
Plaintiff-Appellant	)	
	)	
v.	)	ON APPEAL FROM THE
	)	UNITED STATES
CITY OF YOUNGSTOWN	)	DISTRICT COURT FOR
	)	THE NORTHERN
Defendant-Appellees	)	DISTRICT OF OHIO

BEFORE: KEITH and MARTIN, Circuit Judges; and CELEBREZZE, Senior Circuit Judge

PER CURIAM: Plaintiff Barbara Martin ("Martin") filed a lawsuit against the City of Youngstown ("defendant" or "City") for alleged sexual harassment in the workplace. She sought damages pursuant to Title VII of the Civil Rights Act and 42 U. S. C. § 1983. Martin also alleged that she had been retaliated against by defendant after

she filed a claim of sexual harassment. Martin was granted a jury trial on the § 1983 cause of action. The jury trial began on November 14, 1990, and the case was submitted to the jury on November 21, 1990. The jury concluded that Martin was not subjected to "unwelcomed sexual harassment" at her place of employment.

The district court ruled on the Title VII claim, and held that Martin had been retaliated against for complaining of sexual harassment. The district court granted remedial damages primarily requiring defendant to implement a process for handling sexual harassment claims and providing training to its employees on sexual harassment. the district court provided for Martin to return to work within 30 days after defendant implemented the training program.

Martin claims on appeal that the district court should have awarded her back and front pay damages, that a new trial should have been granted due to various errors discussed below, and that the jury verdict was not supported by the evidence. Defendant cross-appeals challenging the district court's finding of retaliation and its grant of remedial damages. For the reasons stated below, we REVERSE the jury verdict as well as the district court's denial of back pay, REMAND for a calculation of damages, and AFFIRM the remainder of the district court's judgment.

I.

Martin was hired by defendant in January 1988. She was hired as a plant operator, a position which entails various duties in the Youngstown Waste Water Treat-

ment Plant (the "plant"). Martin was the first woman hired as a plant operator. Martin contends that she was sexually harassed shortly after she began work at the plant.

Martin claims that for a month after she began work, she was not given a properly fitting uniform and was harassed about the male, oversized uniform that she had to wear. There were no restroom/locker room facilities for female employees until several months after she had been employed, and the door to the locker room that was finally assigned to Martin did not have a lock on it. When the plant finally added a lock to her locker room, Martin's immediate supervisor Dominic Greco ("Greco") allegedly threatened to drill a hole through the showers so that he could observe Martin showering.

During Martin's one year tenure at defendant's plant, several other incidents occurred. Martin alleged that on one occasion, Union President Crawford ("Crawford") slid a pencil between Martin's legs in the presence of several co-workers. She claims that on another occasion she was ridiculed by Greco about a lump found in her breast when she requested assignment to light duties until the lump could be diagnosed. Greco allegedly responded to Martin's request by telling her to tell her husband to "quit playing" with her "boobs." Other sexual jokes and innuendos were made by various male co-workers. Several of the workers admitted making sexual jokes, but testified that Martin participated in the allegedly harassing activities. It is undisputed that Martin complained to Greco

about the alleged harassment, but he did nothing because he did not consider the incidents to amount to harassment. Martin claims that she was afraid to bypass Greco because he told her that if she crossed him, "there was a price to pay."

Martin testified at trial that in September 1988 she approached the Chief Operation Manager, Gene Potesta ("Potesta"), regarding the ongoing harassment. Potesta said that he would set up an appointment with the plant manager, Thomas Cardarelli ("Cardarelli"), but did not do so. Martin later scheduled an appointment directly with Cardarelli. During this meeting, Martin showed Cardarelli a note that had been given to her by Crawford, which said, "I can take you for a ride in my new car, but it's hard to have sex in a 'Vette." Martin also

showed Cardarelli obscene literature that male employees left at stations where she had to work. In addition, she claimed that on one occasion, Greco tried to kiss her. She asked for a crew transfer, but Cardarelli allegedly responded that such action would make Greco look guilty and, therefore, denied Martin's request for a transfer.

Finally, when Martin could find no internal remedy, she sought help from an attorney, who called defendant's Equal Employment Opportunity officer, William Carter ("Carter"). They set up a meeting, which was attended by Martin, her attorney, Carter, Cardarelli, Greco and Crawford. Cardarelli and Carter both testified at trial that Greco admitted the kissing incident during the meeting, but implied

that it was consensual. Greco denied the incident altogether at trial. It was undisputed that Crawford wrote the above referenced note, although he denied its obvious sexual meaning.

A short time after the meeting, Martin injured her hand in a work-related accident and was on medical leave for several weeks. Upon her return, she claims that she was subjected to adverse treatment as a result of her complaint of sexual harassment. She testified that Greco begin to keep negative notes about Martin's performance, which had been satisfactory prior to the meeting. In addition, Greco allegedly became hostile to Martin. Martin claims that Greco told her he wanted her to be his "whore," and on one occasion he was so offensive that Martin began crying in front of co-workers and contractors.

from her work area and previous locker room. the new building was isolated and was occupied by plant workers on only one of three shifts.

After the transfer, Martin was frequently relieved late by her co-worker under the plant's buddy system. She had always been relieved in a timely manner before the meeting regarding harassment. On one occasion when Greco was filling in to supervise Martin's crew, he assigned her to an extremely difficult task requiring Martin to use her previously injured hand. Her hand swelled as a result of doing the work to the point that she because physically unable to do the job. Martin testified that she asked Greco, "why are you treating me like this?" Greco allegedly responded by yelling that "you

started this." Following the incident, Martin was again placed on medical leave for her hand and did not return to work at the plant.

In addition to these allegations, following the jury verdict, Martin claimed that one of the jurors at trial failed to disclose relations with persons employed by the City, which precluded Martin from exercising her right to challenge the juror for bias. Martin moved for a new trial on the basis that she was denied her Sixth Amendment right to an impartial jury. The district court denied the motion for a new trial.

Martin then filed the instant appeal and defendant cross-appealed. Both appeals were timely.

II.

A.

We will first address Martin's challenge to the jury verdict. On appeal, we may only reverse a jury verdict upon finding that there are no controverted issues of facts upon which reasonable men could differ. **King v. Love**, 766 F. 2d 962, 969 (6th Cir.), **cert. denied**, 474 U. S. 971 (1985). We conclude that the undisputed evidence in this case should have resulted in a verdict for Martin.

To prevail on a sexual harassment claim, the plaintiff must establish that harassment on the basis of sex was "sufficiently severe or pervasive 'to alter the conditions of the victim's employment and create an abusive working environment.'"

Meritor Savings Bank, FSB v. Vinson, 477 U. S. 57, 67 (1986). There are essentially two issues raised by the facts of this case. First, we must determine whether the facts show that Martin welcomed or voluntarily participated in several of the acts of which she now complains. We must then review the jury's finding that the undisputed acts did not create an abusive work environment.

Regarding the first claim, Martin's co-workers testified that she was often the subject of or was present while the men made sexual jokes, but they claimed that Martin participated in such activities. It is undisputed, however, that Martin complained to Greco, her supervisor, about the sexual jokes and innuendos. Greco admitted that Martin complained to him

about being sexually harassed and stated that he took no action because "as far as [he] was concerned, it wasn't harassment." We believe that this admission by Martin's supervisor that she complained to him about the conduct completely rebuts the allegation that Martin welcomed the conduct.

In addition, we find the following undisputed facts very persuasive. First, when Martin began her employment, she was not given adequate restroom or locker room facilities and that the male employees could obtain access to her locker room once it was provided. Crawford, the union president, gave Martin a note of a highly offensive sexual nature. Crawford's only defense was that the note was not of a sexual nature, a claim which lacks merit on

its face. Obscene literature was left at work stations that Martin shared with her co-workers. There was undisputed testimony as well that Martin's co-workers and some of the plant supervisors repeated rumors of a sexual nature about Martin. Three persons testified that Martin's supervisor, Greco, attempted to kiss her, although Greco denied this at trial.

Given these facts, we conclude that the verdict that Martin was not sexually harassed is unsupported by the evidence at trial. We believe that the undisputed ongoing conduct by Martin's male counterparts created an abusive work environment. Therefore, we reverse the verdict and hold that Martin was sexually harassed during her employment with the City.

B.

The next issue, raised by defendant, is that the trial court erred in finding that Martin was retaliated against for filing her sexual harassment complaint. When reviewing a district court's findings in a Title VII case, we may not reverse unless we find clear error. **Wrenn v. Gould**, 808 F. 2d 493, 499 (6th Cir. 1987), **cert. denied**, 484 U. S. 1067 (1988).

Defendant claims that the district court's finding that defendant retaliated against Martin is not supported by the evidence. Defendant claims that because Martin was transferred to another department per her request, the transfer was clearly not retaliatory. Moveover, defendant claims that the working conditions in the new department were standard in that department.

Therefore, Martin's harsher work conditions were directly due to the transfer, and were not due to defendant's attempt to retaliate.

Defendant's claim lacks merit primarily because it ignores the other conditions to which Martin claims to have been subjected in retaliation for her complaint of sexual harassment. Martin claimed that she was harassed and given negative reviews by Greco, that other employees were instructed not to talk to her, that she was given different and less desirable job duties than others in her transferred position and that her locker room was moved to a remote part of the plant grounds. The district court found this testimony persuasive, and it provided a sufficient basis upon which the court could conclude that defendant retaliated against Martin. Therefore, we affirm the district court's ruling.

C.

Following its determination that Martin was retaliated against for complaining of sexual harassment, the district court fashioned specific remedial measures for the unlawful conduct. Defendant claims that the remedies are inappropriate and are aimed to redress the underlying harassment claim, and not the retaliation claim. We conclude that the equitable damage award imposed by the district court was aimed at defendant's acts of retaliation and were designed to remedy that unlawful activity. Accordingly, we affirm the court's order for remedial action by defendant and Martin's reinstatement.

Martin contends that the district court erred by denying her damages for back

and front pay. Martin argues that she should be granted damages for front pay in order to retrain for another job. She states that "the normal practice is to award front pay in those situations where reinstatement is not appropriate." **Shore v. Federal Express Corp.**, 777 F. 2d 1155, 1159 (6th Cir. 1985). Although the district court explicitly ordered that Martin return to work, she claims that reinstatement is inappropriate in this case based on her doctor's assessment that Martin should not return to work at the plant.

Having heard Martin's doctor testify, the district court ordered that Martin return to work and that her failure to do so would result in a forfeiture of her claim. The district court explicitly found

contrary to the doctor's testimony in holding that reinstatement was appropriate. Martin has failed to show that this determination was clearly erroneous. Therefore, the denial of front pay is affirmed.

As to Martin's request for back pay, we have previously stated that "back pay awards should completely redress the economic injury the claimant has suffered as a result of discrimination." **Rasimas v. Michigan Department of Mental Health**, 714 F. 2d 614, 626 (6th Cir. 1983), **cert. denied**, 466 U. S. 950 (1984). The issue in this case is whether Martin suffered any economic injury as a result of the sexual harassment and retaliatory action by defendant.

It is undisputed that Martin was not expressly discharged from the Waste Water Treatment Plant. Nor did she allege that she was constructively discharged. But while Martin failed to characterize her leaving defendant's employ as a result of the harassment as "constructive discharge," the district court erred in not reviewing whether the facts supported a finding of construction discharge.

We believe that there was overwhelming evidence to support a finding of constructive discharge. The sexual harassment to which Martin was subjected continued after she complained and, in fact, worsened in response to her complaint. She was given inferior job duties and subject to humiliating and degrading comments. Martin was physically

Martin claimed, and another ex-employee testified, that Greco told other workers not to talk to her. Martin and her family began receiving threatening phone calls. When Martin was finally transferred to a different crew as requested, she was assigned only "primary" duties, which are more difficult than "secondary" duties and are ordinarily interspersed in a plant operator's workload. In addition, the primary duties deprived her of technical experience which would give her knowledge and experience necessary for obtaining a state plant operator license.

Martin claimed that other acts were taken against her in retaliation for her complaint. For example, her locker room/restroom facilities were moved to a newly built building which was far removed

injured as a result of acts by one of her supervisors in retaliation for her complaints. Moveover, her doctor issued a letter excusing Martin from returning to work based on psychological effects she suffered as a result of the abusive environment. While the district court's remedial damages may adequately redress those work conditions, we believe that prior to Martin leaving the plant, those conditions were of such a nature that they resulted in her constructive discharge. Therefore, we reverse the district court's denial of back pay damages and remand for a determination of the amount due Martin as a result of her constructive discharge.

D.

Martin next argues that she is entitled to a new trial on the basis of

numerous alleged errors, most of which we find meritless. We feel compelled to address one of these contentions, however, although it is not essential to our determination of this case. That issue relates to the alleged juror perjury committed during voir dire.

Martin claims that the juror failed to disclose information during voir dire, thereby jeopardizing her right to an impartial jury. Specifically, one of the jurors initially denied having any relatives working for the City of Youngstown. It was discovered during voir dire that Potesta, one of Martin's supervisors, was related to the juror by marriage. Martin was given the opportunity to object to the juror for cause, but elected not to do so. Martin claims that

after the trial, however, she discovered several other family relationships between the same juror and employees in various city departments. She then moved for a new trial. The district court held that Martin could not challenge the juror since the jury verdict had already been rendered.

The district court's failure to inquire into Martin's allegations was entirely inappropriate. It is incumbent on a district court to hold an evidentiary hearing on the issue of a juror's failure to disclose information on voir dire. **McCoy v. Goldston**, 652 F. 2d 654 (6th Cir. 1981). While Martin may have waived her right to challenge the juror on matters discovered during voir dire, she should not have been precluded from challenging the juror for alleged misrepresentations dis-

covered later in the proceedings. We, therefore, admonish the district court for its failure to conduct a hearing on this important matter. Nevertheless, we hold that the error was harmless in light of our decision to reverse the jury verdict.

III.

For the above stated reasons, we REVERSE the jury verdict and the district court's denial of back pay, REMAND for a calculation of damages in accordance with this decision, and AFFIRM the district court's judgment in all other respects.

UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF OHIO

EASTERN DIVISION

Barbara Martin Plaintiff vs. City of Youngstown, et al. Defendant	)	Case No. 4:89CV2450 **MEMORANDUM OPINION**

I. INTRODUCTION.

The plaintiff filed this lawsuit alleging that she was sexually harassed in the work place by fellow employees of the City of Youngstown. She sought damages pursuant to the provisions of Title VII of the Civil Rights Act and 42 U. S. C. § 1983. The plaintiff also alleged that she had been retaliated against by her employer

after she filed a claim of sexual harassment. The plaintiff was entitled to a jury trial on the § 1983 cause of action. The jury trial began on November 14, 1990 and was submitted to the jury on November 21, 1990, following five days of testimony. The jury was provided with interrogatories and discharged after they returned a negative answer to the first interrogatory which asked the following question:

> Has plaintiff Barbara Martin proven by a preponderance of the evidence that she was subjected to unwelcomed sexual harassment at her place of employment in the form of sexual advances, requests for sexual favors, or other verbal or physical conduct of a sexual nature, when viewed from the perspective of a reasonable person?

As a consequence of the jury's response to the interrogatory, the Court has before it the resolution of the Title

VII action alleging sexual harassment in the work place, the plaintiff's motion for a new trial on the § 1983 claim, and the plaintiff's Title VII claim of retaliation. The Court will address the issues in seriatim.

II. THE TITLE VII ACTION FOR SEXUAL HARASSMENT IN THE WORK PLACE.

At the outset, the Court notes as a general proposition that its determination of the Title VII action is bound by the jury's determination on the § 1983 claim.

The preclusive effect of collateral estoppel must be accorded the jury's response to the First Interrogatory on the § 1983 claim as the predicate for that claim was identical to the predicate for the Title VII claim, i. e., unwelcome sexual harass-ment in the work place. Consequently, this Court is without power

to render a judgment on the Title VII claim inconsistent with the jury's response to the issue of "unwelcome sexual harassment" on the § 1983 claim. Garza v. City of Omaha, 814 F. 2d 553, 557 (8th Cir. 1987). C. F., Wade v. Orange County Sheriff, 844 F. 2d 951, (2nd Cir. 1988) and Roebuck v. Drexel University, 852 F. 2d 715, 737 (3rd Cir. 1988).

Nonetheless, the plaintiff contends that the additional testimony that the Court heard out of the presence of the jury with respect to its examination of Mr. Greco, the plaintiff's supervisor, present a situation where the Court is no longer bound by the jury's determination on the § 1983 claim. The Court need not decide that issue for it concludes that the testimony

the allegations but additionally mounted a defense which took the position that the plaintiff invited the conduct, and by not being forceful in rejecting the conduct, could not be taken seriously in her courtroom attempt to extract a large sum of money from her employer for the conduct of her male supervisor and fellow male employees.

Moreover, the Court takes seriously the bind effect of the jury's determination. If, as the plaintiff suggests, the Court would no longer be bound by the jury's determination by taking evidence out of the jury's hearing, the Court would have the power to subvert the effect of the jury's determination by the device of taking testimony on the merits of the Title VII claim in the absence of the

of Greco out of the hearing of the jury[1] was not of such a nature as to overcome the preclusive effect of the jury's response to the first interrogatory. The plaintiff presented testimony of a number of incidents that she characterized as sexual harassment. The defendants denied many of

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[1]The plaintiff leveled a series of charges against her supervisor Mr. Greco. Greco did not respond to all of the charges nor was he cross examined about his absence of a response. The Court conferred with counsel at the side bar and learned that neither party wishes to pursue further the question of Mr. Greco. The Court was reluctant to question Greco in the presence of the jury in the belief that such a questioning might unduly influence the jury with respect to the issues that it had before it. Consequently, the Court excused the jury and questioned Greco. In hindsight, given the preclusive effect of the jury's verdict, the Court is of the view that it was ill advised to have conducted a separate examination of Greco in the absence of the jury.

jury. The Court does not believe such to be the law and, in any event, will adopt the jury's position on the merits of the plaintiff's Title VII claim and grant judgment for the defendants on the plaintiff's Title VII claim alleging sexual discrimination in the work place by a practice of sexually harassing the plaintiff.

III. THE PLAINTIFF'S MOTION FOR A NEW TRIAL.

The plaintiff asserts three reasons in support of her motion for a new trial on the § 1983 claim. First, the plaintiff contends that the jury's answer to the first interrogatory was against the manifest weight of the evidence. Secondly, the plaintiff contends that the Court committed prejudicial error in failing to

instruct the jury on the text of EEOC guidelines regarding sexual harassment in the work place. Finally, plaintiff contends that a new trial should be granted because one of the jurors failed to answer truthfully concerning her acquaintanceship with possible witnesses and her general relationship with other employees of the City of Youngstown.

Testimony was presented, if believed by the jurors, that justified the jury's negative response to the first interrogatory. Credibility of the witnesses was an issue for the jurors. They resolved the credibility of the witnesses to the detriment of the plaintiff. The issue is not whether the Court would have decided the case differently, but whether there was evi-

dence upon which the jury could base its answer to the first interrogatory. The Court finds that there was such evidence. The claim that the jury's answer to the interrogatory was against the manifest weight of the evidence is without merit.

The challenged failure in the jury instruction deals essentially with the liability of the employer City of Youngstown. The Court submitted extensive interrogatories to the jury designed to reach the issue of whether there was a pattern or practice of unwelcomed sexual harassment in the work place in the City of Youngstown that would have created a municipal liability under the restrictive judicial interpretation of municipal liability in a § 1983 setting. The Court is of the view that it properly instructed

the jury on that issue and properly denied the plaintiff's request for an instruction on the text of the EEOC Guidelines. However, in any event, the Court fails to see how instructing the jury on the text of the guidelines would have affected the jury's response to the first interrogatory. The motion for new trial based on an improper jury instruction is denied.

Finally, the plaintiff contends that one of the jurors who was a resident of the City of Youngstown gave untruthful answers during voir dire and the fact of her untruthful answers demands a new trial. As indicated in the plaintiff's brief in support of a motion for new trial, once a possible basis for challenging for cause the challenged juror arose, the Court brought that juror into the Courtroom and

had her questioned in the absence of other jurors to determine whether either party wished to challenge the juror. By that time it was apparent that the juror was related to an employee of the City of Youngstown that formerly had worked at the Youngstown Waste Water Treatment Plant. Knowing that fact, the plaintiff elected not to mount a challenge to the juror. Now the plaintiff asserts, without any affidavit to support the allegation, that the juror had a more specific relationship with the City of Youngstown and gave untruthful answers. In the Court's view, the danger that the juror represented because of her relationship with at least one of the former employees of the Waste Water Treatment Plant was evident to counsel. Neither party elected to chal-

lenge the juror. In the Court's view, it is now too late for the plaintiff, disappointed with the jury's verdict, to challenge the juror in question. To grant a new trial on such a proposition would be to extend to the plaintiff the proverbial "heads I win, tails you lose" position when first acquainted with the fact of the juror's acquaintanceship and potential knowledge with respect to the issues that would arise during the trial.

In sum, the Court finds that the plaintiff's motion for a new trial on her § 1983 claim to be without merit and it is overruled.

IV. THE PLAINTIFF'S CLAIM FOR RETALIATION.

On January 24, 1989, plaintiff filed her charge of discrimination based on

allegations of sexual harassment with the Ohio Civil Rights Commission. On April 19, 1989, plaintiff filed a second charge of discrimination alleging that she was retaliated against after she complained to management that she was being sexually harassed.

42 U. S. C. § 2000(e)-3(a) provides:

> (a) It shall be an unlawful employment practice for an employer to discriminate against any of his employees or applicants for employment, ... because he has opposed any practice made an unlawful employment practice by this subchapter, or because he has made a charge, testified, assisted, or participated in any manner in an investigation, proceeding, or hearing under this subchapter.

In this case, even though some of the allegedly retaliatory conduct occurred before the filing of a formal charge, plaintiff states a claim for retaliation

because she has "opposed any practice made by an unlawful employment practice by this subchapter," by making complaints of sexual harassment to her supervisor.[2]

A valid claim of retaliation under Title VII does not require as a condition precedent proof of the initial claim. The fact that the jury disagreed with the plaintiff on her claim of sexual harassment in the working place does not defeat the retaliation claim.

The plaintiff's claim of retaliation filed with the Ohio Civil Rights Commission was specific as she alleged:

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[2]It is well established and defendant City concedes that the plaintiff brought her claim of sexual harassment to the attention to Mr. Carter, the City's Equal Employment Opportunity Supervisor, in either September or early October of 1988.

B. In October 1988, I complained to management that I was being sexually harassed, I requested that I be transferred to a different crew. Subsequently, on December 7, 1988, I was advised that I was being transferred to James Drummend's crew. However I was transferred to a primary operator position, whereas, prior to my transfer, I was a secondary operator. The primary operator position is a less desirable position. In addition, I will receive less training in the Plant Operations and I will be unable to advance to any position other than secondary operator.

C. Since I complained about the sexual harassment I have been subjected to harassment by other employees. For example: I was relieved late everyday by Artie Lewis when I worked at the punch station. My co-workers would pump my time card even though I was still working.

D. I believe that William Crawford, Union President, has told the other employees to not speak to me.

E. Prior to complaining about the sexualy [sic] harassment, I had an excellent work record. However, since I complained, I

believe that my work record has been changed and it now contains reports which state that I was not performing my job as I should. I believe that Mr. Crawford and other employees have called City Hall to complain about my job performance and character.

F. From December 9, 1988 until January 25, 1989, I was bypassed for overtime. Several times it was my turn to work overtime, but I was not contacted.

G. I believe I am being retaliated against because I complained about being sexually harassed. I also believe that I am being discriminated against because of my sex. I was the only female employee at the plant until March 1989. Males are not so treated.

The Court finds that the plaintiff has proved by a preponderance of the evidence her claim of retaliation by reason of her initial claims of sexual harassment. As claimed, the plaintiff was transferred to another crew and away from the alleged primary tormentor, her supervisor Mr.

Greco, after her complaint, but the transfer placed her in a less desirable position. Moveover, her changes of advancement were adversely affected by the transfer.

Additionally the plaintiff was effectively ostracized from the remaining work force.[3] The male employees were

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[3]A former fellow employee, Mr. Llewellyn, testified in support of the plaintiff on the issue of the plaintiff being ostracized. Defendants discount his testimony because he was discharged upon the completion of this probationary period. However, the Court found the testimony of Llewellyn to be credible. Ironically, the defendants asserted, in an attempt to discredit his testimony, that one of the reasons for Llewellyn's discharge at the conclusion of this probationary period was the fact that he had insulted a superior, a black, Robert Carter, by singing "Mammy" in the shower, while at the same time ignoring such events as the male practice endorsed by the supervisors of maintaining in the work place involving the plaintiff and her fellow male employees a large quantity of obscene and highly pornographic magazines depicting women in a disrespectful and degrading fashion.

instructed not to talk to her. The City, through its supervisors, made no effort to address the allegations of sexual harassment in the work place other than to deny their existence. Claims of sexual harassment are easy to make and easy to deny, but in this case Youngstown adopted a posture of denial of the very existence of such allegations as the primary method of working with the issue of sexual harassment in the work place. The Court finds the testimony of the defendant's witnesses on the subject of retaliation not to be credible and finds for the plaintiff on the claim of retaliation.

V. REMEDY.

The plaintiff seeks front pay as an alternative to returning to her job which the defendant City has held open for her

during this litigation. The plaintiff takes the position that she is unable to return because of the psychological damage inflicted on her by the action of the defendant employees. The Court finds that the plaintiff's claim for front pay is anchored in her rejected claim of unwelcome sexual harassment, not her claim of retaliation. Consequently, the Court will not award the plaintiff either back pay or front pay for the retaliation.

However, the Court is of the view that a comprehensive remedial order should be fashioned in this case to protect employees who make claims of sexual harassment from suffering retaliation. The nature of the remedial order is somewhat complicated by the fact that the plaintiff strongly urges upon the Court the proposition that she

should be entitled to front pay in lieu of a return to work. On the other hand, the City of Youngstown has steadfastly maintained that the plaintiff's job is still open and available for her return. The plaintiff seeks front pay because of her view that the defendant the City of Youngstown and its male employees are so insensitive to the rights of women in the work place, that she could not again work for the City of Youngstown in such a setting. The Court is of the view that the defendant City of Youngstown does not have adequate procedures in place to enable employees to assert sexual harassment claims. In the absence of such a setting, sexual harassment claims and retaliation for such claims are likely to flourish. Moreover, there has been no indication that

the City of Youngstown is prepared to train its employees on the nuances of sexual harassment in the work place where women are introduced into the work place formally occupied entirely by males. Given that situation, the Court will include the following remedial order in the context of equitable relief in its judgment:

1. The City of Youngstown will present to the Court for its approval within forty (40) days of this Order a written plan to process and adjudicate claims of sexual harassment by employees of the City of Youngstown in the work place. The plan as a minimum shall outline the process by which an employee may file such a claim and the procedure

for adjudicating the claim. The plan shall include the instruction that the fact of the filing of the claim shall not subject the complainant to any disciplinary action. The plan shall also include a procedure for a speedy resolution of the complaint and a procedure for appealing the resolution of the complaint by either the complainant or the person against whom the complaint has been lodged.

2. The City shall provide at its expense by April 22, 1991, two hours of in-service training to the employees of the Waste Water Treatment Plant on the subject of

sexual harassment and retaliation in the work place and certify to the Court by April 29, 1991 that all employees have received such training.

3. Upon completion of the training as specified in paragraph two and the filing of the certification of the completion of the training, the plaintiff shall have a period of thirty (30) days to return to her employment with the Youngstown Waste Water Treatment Plant. Upon her return, the plaintiff shall be placed at the level of her employment and pay grade that she enjoyed when she first complained of her treatment in October of 1988.

4. If the plaintiff fails to return to work during the thirty (30) day period following the certification required by paragraph two of this Order, the plaintiff shall forfeit her right to return to the position and the defendant, the City of Youngstown, will have no further obligation to hold open plaintiff's position in the Waste Water Treatment Plant.

In the event the plaintiff elects to return to work, she shall not be subject to any adverse action by the defendant without cause and she shall not be subject to any sexual harassment.

5. In the event the defendant fails to certify the completion of the training ordered by paragraph two by April 29, 1991, the plaintiff shall be compensated biweekly at the rate she would be drawing if she returned to work in her position as employee of the Waste Water Treatment Plant and the defendant's obligation shall continue until the certification required by paragraph two is filed with the Clerk of this Court after which the provisions of Section three and four shall prevail.

6. In the event the plaintiff returns to work with the City of Youngstown in the Waste Water Treatment Plant, the Court will retain jurisdiction of this case for one year following the plaintiff's return to work.

7. No provision in this remedial order shall prohibit the plaintiff from returning to work prior to the certification ordered in paragraph two.

VI. ATTORNEY FEES.

The Court is aware that its decision may prompt an appeal by either the plaintiff or the defendant. A collateral issue is the subject of attorney fees and that issue frequently inhibits settlement or a decision to forego an appeal. There

is no pending application for fees because without this order the plaintiff would not have standing to assert a claim for fees under 42 U. S. C. § 1988. In any event, plaintiff's counsel would be in a position as requesting fees for partial success only.

In an effort to assist the parties in reaching a conclusion to this litigation, the Court offers the view that an allocation of $10,000 in attorney fees and an allowance of $2500 for expenses would be reasonable based on the Court's perception of the time devoted to the prosecution of the case by the plaintiff's counsel and taking into consideration the hourly rate that should be allowed and the fact that the plaintiff has achieved only partial success.

The Court has written on attorney fees in numerous cases where it steadfastly applies the Northcross solution to applications to attorney fees and counsel are invited to call the Court's chambers for examples of those decisions. Obviously, if the parties are not able to resolve the issue of attorney fees, then the Court will accept an application for the fees. However, the Court will delay any decision of the issue of fees until the judgment is final by reason of appellate review or final because no appeal is taken.

VII. COMPLIANCE WITH THE ORDER IN THE EVENT OF AN APPEAL.

This case has been hotly contested. The parties hold to strong and diverse views. Allegations of sexual harassment create a highly emotional reaction. The defendant City of Youngstown is governed by

a City Council. The Court understands that City Council approval is required for a settlement of any litigation against the City in excess of a minimal amount. It is highly likely that both parties will be dissatisfied with this ruling. Either or both parties may elect to appeal. In an attempt to outline the Court's position with respect to compliance with its order in the event of an appeal, the Court outlines its position in such an event.

In the event the plaintiff elects to file a notice of appeal, the City will have no obligation to comply with any of the provisions of the remedial order until the appeal is resolved. If the appeal is resolved by an affirmance of the Court's remedial order, the Court will publish new dates for the City's compliance with the remedial order.

In the event the defendant City appeals and the plaintiff does not file a cross appeal, and the result of the appeal is an affirmance of the Court's remedial order, the Court will require the City to pay the plaintiff back pay as of April 29, 1991 to the extent that the plaintiff has not returned to work. However, if the City has voluntarily complied with the provisions of paragraphs one and two of the remedial order during the pendency of the appeal, the plaintiff will be obliged to return to work within thirty days of the certification or forfeit her job notwithstanding the outcome of the appeal.

Finally, if both parties prosecute an appeal and the defendant City does not voluntarily comply with the provisions of paragraphs one and two, the provisions of

the remedial order will be stayed until resolution of the appeal.

VIII. CONCLUSION.

The Court will publish a separate judgment entry which will grant the defendants judgment on the plaintiff's § 1983 claim and Title VII claim based on sexual harassment in the work place, deny the plaintiff's motion for a new trial on her § 1983 claim against the defendants, award the plaintiff judgment against the defendant City of Youngstown on the plaintiff's Title VII claim for retaliation and grant the plaintiff equitable relief against the City of Youngstown by way of the remedial order outlined herein.

IT IS SO ORDERED.

David D. Dowd, Jr.
U. S. District Judge

UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF OHIO

EASTERN DIVISION

Barbara Martin	)	Case No. 4:89CV2450
	)	
Plaintiff	)	
	)	
vs.	)	JUDGMENT ENTRY
	)	
City of Youngstown et al.	)	
	)	
Defendant	)	

For the reasons set forth in the Memorandum Opinion filed contemporaneously with this Judgment Entry, IT IS HEREBY ORDERED, ADJUDGED and DECREED that the defendants are granted judgment on the plaintiff's § 1983 claim against the defendants is denied, the plaintiff is awarded judgment against the defendant City of Youngstown on the plaintiff's Title VII claim for retaliation and the plaintiff is

granted equitable relief against the City of Youngstown as follows:

1. The City of Youngstown will present to the Court for its approval within forty (40) days of this Order a written plan to process and adjudicate claims of sexual harassment by employees of the City of Youngstown in the work place. The plan as a minimum shall outline the process by which an employee may file such a claim and the procedure for adjudicating the claim. The plan shall include the instruction that the fact of the filing of the claim shall not subject the complainant to any disciplinary action. The plan

shall also include a procedure for a speedy resolution of the complaint and a procedure for appealing the resolution of the complaint by either the complainant or the person against whom the complaint has been lodged.

2. The City shall provide at its expense by April 22, 1991, two hours of in-service training to the employees of the Waste Water Treatment Plant on the subject of sexual harassment and retaliation in the work place and certify to the Court by April 29, 1991 that all employees have received such training.

3. Upon completion of the training as specified in paragraph two and the filing of the certification of the completion of the training, the plaintiff shall have a period of thirty (30) days to return to her employment with the Youngstown Waste Water Treatment Plant. Upon her return, the plaintiff shall be placed at the level of her employment and pay grade that she enjoyed when she first complained of her treatment in October of 1988.

4. If the plaintiff fails to return to work during the thirty (30) day period following the certification required by para-

paragraph two of this Order, the plaintiff shall forfeit her right to return to the position and the defendant, the City of Youngstown, will have no further obligation to hold open plaintiff's position in the Waste Water Treatment Plant.

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5. In the event the defendant fails to certify the completion of the training ordered by paragraph two by April 29, 1992, the plaintiff

shall be compensated biweekly at the rate she would be drawing if she returned to work in her position as employee of the Waste Water Treatment Plant and the defendant's obligation shall continue until the certification required by paragraph two is filed with the Clerk of this Court after which the provisions of Section three and four shall prevail.

6. In the event the plaintiff returns to work with the City of Youngstown in the Waste Water Treatment Plant, the Court will retain jurisdiction of this case for one year following the plaintiff's return to work.

7. No provision in this remedial order shall prohibit the plaintiff from returning to work prior to the certification ordered in paragraph two.

David D. Dowd, Jr.
U. S. District Judge

Supreme Court, U.S.
FILED
NOV 19 1992
OFFICE OF THE CLERK

No. 92-696

In The

Supreme Court of the United States

October Term, 1992

CITY OF YOUNGSTOWN, ET AL.,

Petitioners,

v.

BARBARA MARTIN,

Respondent.

Petition For Writ Of Certiorari To The United States Court Of Appeals For The Sixth Circuit

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

ISSUE I A WRIT OF CERTIORARI SHOULD NOT BE GRANTED IN A CASE WHERE THE COURT OF APPEALS CORRECTLY FOUND ABUSE OF DISCRETION BECAUSE THE LOWER COURT FAILED TO WEIGH THE EVIDENCE IN DECIDING ON A MOTION FOR A NEW TRIAL AND ISSUING A BENCH RULING UNDER TITLE VII.

ISSUE II A WRIT OF CERTIORARI SHOULD NOT BE GRANTED WHERE THE ISSUES PRESENTED BY THE PETITIONER ARE BASED SOLELY ON ISSUES OF FACT SPECIFIC TO THIS CASE.

ISSUE III A WRIT OF CERTIORARI SHOULD NOT BE GRANTED WHERE PETITIONER HAS FAILED TO FOLLOW PROPER PROCEDURE AND WHERE THE FILING OF THE PETITION FOR WRIT OF CERTIORARI WAS UNTIMELY.

TABLE OF CONTENTS

Page

Table of Authorities iii

Opinions Below 1

Jurisdiction 2

Statutes Involved 3

Statement of the Case 3

ISSUE I A WRIT OF CERTIORARI SHOULD NOT BE GRANTED IN A CASE WHERE THE COURT OF APPEALS CORRECTLY FOUND ABUSE OF DISCRETION BECAUSE THE LOWER COURT FAILED TO WEIGH THE EVIDENCE IN DECIDING ON A MOTION FOR A NEW TRIAL AND ISSUING A BENCH RULING UNDER TITLE VII. 10

ISSUE II A WRIT OF CERTIORARI SHOULD NOT BE GRANTED WHERE THE ISSUES PRESENTED BY THE PETITIONER ARE BASED SOLELY ON ISSUES OF FACT SPECIFIC TO THIS CASE. 14

ISSUE III A WRIT OF CERTIORARI SHOULD NOT BE GRANTED WHERE PETITIONER HAS FAILED TO FOLLOW PROPER PROCEDURE AND WHERE THE FILING OF THE PETITION FOR WRIT OF CERTIORARI WAS UNTIMELY. 16

CONCLUSION 19

TABLE OF AUTHORITIES

Page

CASES

Bondie v. BIC Corp., 947 F.2d 1531 (6th Cir. 1991) 12

Bruner v. Dunaway, 684 F.2d 422 (6th Cir. 1982), *cert denied sub nom Bates v. Bruner*, 459 U.S. 1171 (1983) 12

Charles v. Norfolk & Western Ry. Co., 188 F.2d 691 (7th Cir. 1951), *cert denied*, 342 U.S. 831 (1951) 13

FTC v. American Tobacco Co., 274 U.S. 543 (1927).... 11

FTC v. Standard Oil Co., 355 U.S. 396 (1958).....11, 14

Fryman v. Federal Crop Ins. Corp., 936 F.2d 244 (6th Cir. 1991) 12

General Talking Pictures Corp. v. Western Electric Co., 304 U.S. 175 (1938).... 11

Georgia Pacific Corp. v. United States, 264 F.2d 161 (5th Cir. 1959).... 13

J.C. Wyckoff & Assoc. v. Standard Fire Ins. Co., 936 F.2d 1474 (6th Cir. 1991).... 12

Logan v. Dayton Hudston Corp., 865 F.2d 789 (6th Cir. 1989) 12

McBee v. Bomar, 296 F.2d 235 (6th Cir. 1961)..... 13

McCoy v. Goldston, 652 F.2d 654 (6th Cir. 1981)..... 9

The Monrosa v. Carlson Black Export Co., 359 U.S. 180 (1959).... 11

NLRB v. Pittsburgh Steamship Co., 340 U.S. 498 (1951).... 11

TABLE OF AUTHORITIES – Continued

Page

Southern Power Co. v. N.C. Public Service Co., 263 U.S. 508 (1924) 11

TCP Industries v. Uniroyal, 661 F.2d 542 (6th Cir. 1981) 10

United States v. Johnston, 268 U.S. 220 (1925) 11

United States v. Simmons, 346 F.2d 213 (5th Cir. 1965) 13

United States v. U.S. Gypsum Co., 333 U.S. 364 (1948) 12

STATUTES

28 U.S.C. Section 1254(1) 2

42 U.S.C. Section 1983 ..... *passim*

43 U.S.C. Section 2000e, *et seq.* (Title VII) ..... *passim*

OTHER

11 C. Wright & A. Miller, Federal Practice & Procedure, Civil, Section 2806 12

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v.

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Respondent.

Petition For Writ Of Certiorari To The United States Court Of Appeals For The Sixth Circuit

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

Respondent Barbara Martin respectfully prays that this Court deny a writ of certiorari and dismiss the petition.

OPINIONS BELOW

On March 5, 1991, the Memorandum Opinion and Judgment Entry of the United States District Court for the Northern District of Ohio was issued. In the Opinion, the Court upheld the 42 U.S.C. Section 1983 jury verdict in a

preliminary Interrogatory that no unlawful sexual harassment had occurred and denied Plaintiff's Motion for a New Trial. The lower court issued findings of fact and conclusions of law that Petitioner was liable for retaliation in violation of 42 U.S.C. Section 2000e *et seq.* but did not issue findings of fact and conclusions of law on the sexual harassment claim under 42 U.S.C. Section 2000e, *et seq.*

On April 28, 1992, the Sixth Circuit issued its per curiam opinion finding that as a matter of law sexual harassment had occurred. The Court upheld the lower court's conclusion that retaliation had occurred and remanded for a calculation of damages including back pay.

On July 13, in response to a "Petition for Rehearing En Banc" filed by Petitioner, the Sixth Circuit corrected its erroneous standard of review cited on April 28, found that the lower court had abused its discretion and denied the Petition. The Mandate on this second order was issued on July 21, 1992.

None of these opinions are reported. Petitioner attached each of them in its Appendix, but numerous errors in the Appendix create an undependable record for this Court to review.

JURISDICTION

The discretionary jurisdiction of this Court arises under 28 U.S.C. Section 1254(1).

Respondent respectfully requests that the Court not exercise its discretionary jurisdiction where Petitioner seeks only to have a review of factual issues having no exceptional importance to development of the law. Petitioner does not allege the Sixth Circuit Opinion is in conflict with other circuits or controlling law.

STATUTES INVOLVED

Petitioner cites the statutes involved: 42 U.S.C. Section 1983 and 42 U.S.C. Section 2000e, *et seq.*, also known as "Title VII."

STATEMENT OF THE CASE

As the first female wastewater treatment plant operator in the City of Youngstown, Barbara Martin endured months of sexually offensive behavior, numerous incidents of difference in treatment based on sex, and was forced to work in an environment generally hostile to her on the basis of her sex.

After complaining to her immediate supervisor for several months without remedy, Martin sought assistance through upper level management and Petitioner's Equal Employment Opportunity officer.

When she began to aggressively pursue her complaints, Martin was assigned less desirable work assignments. She was generally ignored by her co-workers. Her health and safety were in jeopardy as a result of this retaliatory behavior.

Martin filed a Complaint in the United States District Court for the Northern District of Ohio. She alleged violations of her rights under 42 U.S.C. Section 2000e, *et seq.* for sex discrimination, sexual harassment and retaliation. Pursuant to 42 U.S.C. Section 1983, she alleged a pattern and practice and failure to train which led to these violations of her rights.

During the day and a half of her own testimony she described in detail the dozens of incidents leading to her filing her charges of discrimination based on sexual harassment and retaliation. Four other City of Youngstown employees, also women in non-traditional positions (police officers, paramedic and water department workers), testified about their complaints of incidents of sexual harassment that remained unresolved. Their testimony demonstrated a pattern by the EEO office of the City of Youngstown to ignore such complaints.

Petitioner contradicted some incidents. Numerous other incidents were admitted by defense witnesses or not addressed by the defense. This uncontradicted evidence, in and of itself, was enough to establish sexual harassment.

Among the uncontroverted evidence of a sexually hostile environment were the following incidents:

* A note delivered to Martin from a supervisor (who was also the Union president) implying an invitation for sex. The union president never testified. The note is an exhibit.

* The same supervisor/Union president pushed a pencil between Martin's legs as she

sat talking with co-workers. Defense witnesses acknowledge this happened.

* Sexually explicit magazines were placed throughout the plant, including in the drawer of Martin's work desk. When she threw them away, co-workers replaced them.

* Untrue rumors about sexual relationships between Martin and co-workers were spread. Defense witnesses admitted hearing these rumors.

Her supervisor also admitted kissing her and making comments about her body, but alleged that these incidents were not intended to be offensive. Throughout Martin's first seven months, Petitioner never took action to remedy the sexually hostile environment. Her immediate supervisor testified that he took no action because he did not believe her complaints constituted sexual harassment.

Putting aside that certain evidence was challenged, the unchallenged evidence constituted sexual harassment in violation of Title VII. The Sixth Circuit was so astounded by the large amount of undisputed evidence that it acted to correct the lower court's error.

The jury verdict addressed only the Title VII claim.

Because of the nature of review of a Section 1983 claim, a jury is first required to determine whether facts were presented to support the underlying act alleged to be unlawful. Here, Title VII violations in the form of sexual harassment and retaliation were alleged. The Court presented a number of interrogatories to the jury.

The jurors were to respond to these interrogatories in an orderly fashion to decide whether a pattern or practice of sexual harassment led to a violation of Section 1983.

Interrogatory One required the jury to determine if "unlawful sexual harassment" had occurred. The jury responded with a "no" answer and ceased deliberations. The subsequent interrogatories relating to a determination under Section 1983 were never answered.

In ruling on the Title VII allegation of sexual harassment, the Judge was bound by the verdict in Interrogatory One unless he decided the verdict was against the manifest weight of the evidence. After briefing by the parties, but without reviewing the record, the Judge upheld the verdict in Interrogatory One and did not find that sexual harassment occurred pursuant to Title VII. He issued no findings of fact or conclusions of law stating:

> . . . in any event, [the Court] will adopt the jury's position on the merits of the Plaintiff's Title VII claim . . .

The judge apparently felt compelled to uphold the jury verdict without recognizing he had the power to reweigh the evidence. The lower court made no attempt to detail or review the facts supporting the sexual harassment claim. He did find facts and legally conclude that Martin had been retaliated against.

The Motion for New Trial was denied without any balancing of the evidence relating to the sexual harassment claims.

Procedure on Appeal to the Sixth Circuit.

Martin filed an appeal at the Sixth Circuit arguing the jury verdict in Interrogatory One was against the manifest weight of the evidence and that the Judge should have granted a new trial. Petitioner cross-appealed, alleging that the Judge should not have found a violation of Title VII based on retaliation.

In responding to Martin's appeal brief, Petitioner set forth the wrong legal standard, arguing that the denial of Martin's motion for new trial was not "clearly erroneous."

Other issues were also addressed at the Sixth Circuit which Petitioner has not challenged in its Petition for Writ of Certiorari.

After briefing and oral argument, the Sixth Circuit issued an order on April 28, 1992. The Court examined the record in detail and found "undisputed facts very persuasive." The Court concluded "that the verdict that Martin was not sexually harassed is unsupported by the evidence at trial. We believe that the undisputed ongoing conduct by Martin's male counterparts created an abusive work environment." The Court reversed the jury verdict contained in Interrogatory One and held that "Martin was sexually harassed during her employment."

Having found that the jury verdict of Interrogatory One was against the manifest weight of the evidence, the Sixth Circuit proceeded to determine if the trial judge properly ruled on the Title VII claims.

Prior to the Civil Rights Act of 1991, all Title VII claims required a bench trial. However, as in this case,

where Title VII is the statute underpinning a Section 1983 claim, a jury first makes findings of fact on the underlying claim. Finding that the "verdict" contained in Interrogatory One was against the manifest weight of the evidence, the Sixth Circuit mistakenly applied the "clearly erroneous" standard cited by Petitioner in its appellate brief. Based on the record that sexual harassment clearly occurred the Court reversed the verdict and remanded for a calculation of damages.

The Sixth Circuit found other abuses of discretion by the lower court.

During voir dire all jurors were questioned and denied having friends or relatives working for the City or at the wastewater treatment plant. Just before trial began, after all prospective jurors had been dismissed, Petitioner disclosed to the Court that one juror was a cousin of a top manager at the plant.

Upon further questioning, the juror denied knowing about the manager's work. She assured the court her decision as a juror would not be influenced.

After trial, during informal conversation among the attorneys and counsel, this particular juror was very outspoken against Martin. Martin researched this juror's background and learned that she had another relative working at the plant during the relevant time period, and that she had numerous other relatives who had worked or were working for the City. Martin alerted the lower court but was denied a hearing on the issue.

At the Sixth Circuit, Martin repeated allegations raised below. Juror perjury should have required the

lower court to grant a new trial under the ruling of *McCoy v. Goldston*, 652 F.2d 654 (6th Cir. 1981).

In its April 28 ruling, the Sixth Circuit was "compelled" to review the juror perjury issue and "admonish the district court for its failure to conduct a hearing on this important matter." The Sixth Circuit held the lower court's error to be "harmless," because it had ruled in favor of Martin on other grounds.

Petitioner does not raise this ruling in seeking a writ of certiorari. If Petitioner were successful in obtaining the writ and ultimately receiving a favorable ruling from the Supreme Court, the juror perjury would no longer be "harmless" and a new trial would likely be required on that basis.

The "Petition for Rehearing En Banc."

After the Sixth Circuit ruled in favor of Martin, Petitioner filed a "Petition for Rehearing En Banc" with the Sixth Circuit, arguing that the Court used the wrong standard of review and rearguing the facts previously reviewed. Petitioner inaccurately characterized the Sixth Circuit decision as one of weighing credibility, when in fact the Sixth Circuit had not done so. The Sixth Circuit had issued its ruling based on the uncontroverted facts, where a weighing of credibility is not required.

By Order dated July 13, the Sixth Circuit denied the Petition for Rehearing En Banc. The panel corrected the record as to its review:

> In light of those undisputed facts which we have outlined in the original opinion, this Court

> holds that the jury verdict was against the manifest weight of the evidence and the district court abused its discretion in denying plaintiff's motion for a new trial.

The Court properly cited to *TCP Industries v. Uniroyal*, 661 F.2d 542 (6th Cir. 1981), a case where the "abuse of discretion" standard was applied to review the lower court's denial of a motion for a new trial.

On October 16, 1992, Petitioner formally filed its Petition for Writ of Certiorari which is now before this Supreme Court of the United States. Petitioner continues to confuse the standard of review by citing to directed verdict and judgment NOV cases not applicable here.

REASONS WHY THE WRIT SHOULD NOT BE GRANTED

ISSUE I: A WRIT OF CERTIORARI SHOULD NOT BE GRANTED IN A CASE WHERE THE COURT OF APPEALS CORRECTLY FOUND ABUSE OF DISCRETION BECAUSE THE LOWER COURT FAILED TO WEIGH THE EVIDENCE IN DECIDING ON A MOTION FOR A NEW TRIAL AND ISSUING A BENCH RULING UNDER TITLE VII.

A review on writ of certiorari is not a matter of right, but of judicial discretion. A petition for writ of certiorari will be granted only when there are special and important reasons therefor. Rule 10, Rules of the Supreme Court of the United States.

Where conclusions of Circuit Courts of Appeals depend on appreciation of circumstances which admit of different interpretation, the usual rule of the Supreme Court is one of non-interference. *FTC v. American Tobacco Co.*, 274 U.S. 543, 544 (1927); *NLRB v. Pittsburgh Steamship Co.*, 340 U.S. 498, 503 (1951); *FTC v. Standard Oil Co.*, 355 U.S. 396, 400 (1958).

Granting of the writ would not be warranted merely to review the evidence or inferences drawn from it. *Southern Power Co. v. N.C. Public Service Co.*, 263 U.S. 508 (1924); *United States v. Johnston*, 268 U.S. 220, 227 (1925); *General Talking Pictures Corp. v. Western Electric Co.*, 304 U.S. 175, 178 (1938).

While this Court decides questions of public importance, it decides them in the context of meaningful litigation. Its function in resolving conflicts among the Courts of Appeals is judicial, not simply administrative or managerial. *The Monrosa v. Carbon Black Export, Inc.*, 359 U.S. 180, 184 (1959).

Petitioner does not allege that its Questions Presented for Review are of great importance nor that the Sixth Circuit ruling is inconsistent with controlling law or other circuits. Rather, Petitioner argues that the Sixth Circuit needs supervision because it should not have weighed the credibility of witnesses.

The Sixth Circuit did not weigh credibility.

Nowhere in its Opinions does the Sixth Circuit indicate that it weighed the credibility of witnesses or evidence. Instead, the Court thoroughly reviewed the record

and found abuse of discretion because the jury verdict in Interrogatory One was against the manifest weight of the evidence and the lower court failed in its obligation to weigh that evidence. Casting aside any factual disputes, the Appeals Court found that the undisputed evidence painted a picture of a sexually hostile environment in violation of Title VII and remanded.

The Sixth Circuit found abuse of discretion.

To rule on a motion for a new trial, a district court is required to compare opposing proofs, weigh the evidence, and set aside the verdict if it is against the clear weight of the evidence and not one that could reasonably have been reached. *Bondie v. BIC Corp.*, 947 F.2d 1531 (6th Cir. 1991), citing to *J.C. Wyckoff & Assoc. v. Standard Fire Ins. Co.*, 936 F.2d 1474 (6th Cir. 1991); *Fryman v. Federal Crop Insurance Corp.*, 936 F.2d 244 (6th Cir. 1991); *Logan v. Dayton Hudston Corp.*, 865 F.2d 789 (6th Cir. 1989); and *Bruner v. Dunaway*, 684 F.2d 422 (6th Cir., 1982), *cert. denied sub nom, Bates v. Bruner*, 459 U.S. 1171 (1983).

The judge may grant a new trial if "having given full respect to the jury's findings, the judge on the entire evidence is left with the definite and firm conviction that a mistake has been committed . . . " 11 C. Wright & A. Miller, Federal Practice & Procedures, Civil, Section 2806. This standard is analogous to that used by appellate courts when reviewing a trial court's findings of fact in a non-jury case. See *United States v. U.S. Gypsum Co.*, 333 U.S. 364, 395 (1948).

The Sixth Circuit reviewed the evidence to decide both the abuse of discretion/failure to grant a new trial

and the Title VII/sexual harassment issues raised on appeal.

If a trial court fails to exercise its discretion under the mistaken belief that it has no power to grant a new trial, the appellate court can review and rectify the abuse of discretion. *Charles v. Norfolk & Western Ry. Co.*, 188 F.2d 691 (7th Cir. 1951); *Georgia Pacific Corp. v. United States*, 264 F.2d 161 (5th Cir. 1959); and *United States v. Simmons*, 346 F.2d 213 (5th Cir. 1965).

> "Abuse of discretion" is a phrase which sounds worse than it really is. All it need mean is that, when judicial action is taken in a discretionary matter, such action cannot be set aside by a reviewing court unless it has a definite and firm conviction that the court below committed a clear error of judgment in the conclusion it reached upon a weighing of the relevant factors. *McBee v. Bomar*, 296 F.2d 235, 237 (6th Cir. 1961)

The Sixth Circuit review of the lower court decision shows a recognition that the trial court did not perform the proper analysis. The Sixth Circuit was convinced that the lower court committed a clear error of judgment and abused its discretion by not weighing the evidence. When the Sixth Circuit reviewed the evidence, it found "undisputed facts very persuasive." The panel found the sexually harassing environment could not have been welcomed, contrary to the jury's verdict in Interrogatory One, because Martin complained about it and her supervisor admitted at trial that she complained. The panel further found that "undisputed testimony supported Martin's testimony of rumors and comments of a sexual nature."

Because the Title VII claim of sexual harassment was a non-jury determination, the Sixth Circuit inherently found error in the judge's Title VII ruling and issued a finding of sexual harassment.

ISSUE II: A WRIT OF CERTIORARI SHOULD NOT BE GRANTED WHERE THE ISSUES PRESENTED BY THE PETITIONER ARE BASED SOLELY ON ISSUES OF FACT SPECIFIC TO THIS CASE.

Although a Petition for Certiorari that claims the judgment and opinion below might seriously hinder future administration of the law is grave and sufficiently probable to justify issuance of the writ, the writ should be denied when it appears that the proper decision of the controversy depends upon a question of fact. *FTC v. Standard Oil Company, supra,* at 400. Where the facts are not accurately stated, this Court should adhere to the usual rule of non-interference.

Petitioner argues that the Sixth Circuit made a "credibility" decision. Contrary to what Petitioner asserts, the Sixth Circuit did not need to weigh credibility because of the overwhelmingly uncontroverted evidence. The Sixth Circuit's examination of facts was necessary to determine if the lower court abused its discretion. Had the lower court carefully reviewed the evidence, the undisputed facts would have led to a Title VII judgment for Martin.

Petitioner now asks the Supreme Court to review the facts of this case and determine that the undisputed evidence is not believable, therefore the district court didn't abuse its discretion. This Court should not exercise

its jurisdiction to hear a case where the outcome will be for the sole benefit of the parties in a single case.

Petitioner states that the Sixth Circuit panel used the wrong standard of review in reversing the jury verdict and finding sexual harassment. Petitioner is confused. The Sixth Circuit's July 13 Order correcting the record and finding abuse of discretion resolves any ambiguities or errors in the April 28 Opinion.

The Petition contains numerous misstatements of facts.

The Petition for Writ of Certiorari does not contain an accurate picture of the evidence on the record. Numerous misstatements of fact cannot be substantiated by the trial transcript and the record below. Petitioner substitutes its own opinion of what the record should say.

For example, Petitioner states that Martin was hired after "she only placed twelfth on the eligibility list." Petioner fails to explain that Martin was the next, legally eligible candidate, but Petitioner was stalling the hiring process until the eligibility list expired. Martin was hired only after her attorney contacted the EEO officer.

Petitioner ignores the supervisor's admission at trial that Martin complained within a month of starting her employment. This supervisor clearly is management, and places Petitioner on notice. That Martin did not legally fight the issues of sexual harassment until seven months thereafter does not provide a defense to Petitioner for failing to take prompt, remedial action.

Petitioner falsely claims that Martin did not complain about sexual harassment until after she failed the licensing exam. Martin took the exam while under emotional distress just after her meeting with several of the managers at the plant. She and her psychologist both provided testimony on the issue.

Martin never testified that everything was "fine" after she was transferred to the new crew. To the contrary, supporting the finding of retaliation by the trial judge, Martin gave indepth evidence of retaliation after her transfer to the new crew.

Petitioner's discussion of Appellant's alleged "personal problems" are irrelevant to the sexual harassment issue.

This Court should not be persuaded to issue a Writ of Certiorari where Petitioner conveys a fictional view of the record in order to secure a writ of certiorari.

ISSUE III: A WRIT OF CERTIORARI SHOULD NOT BE GRANTED WHERE PETITIONER HAS FAILED TO FOLLOW PROPER PROCEDURE AND WHERE THE FILING OF THE PETITION FOR WRIT OF CERTIORARI WAS UNTIMELY.

The Petition for Writ of Certiorari is technically deficient in several respects. Petitioner has not complied with the Rules of the Supreme Court. Since Petitioner has not provided this Court with any "special and important reasons" for granting a writ, these technical deficiencies should not be overlooked.

The petition was not timely.

A petition for a writ of certiorari to review a judgment in any civil case shall be deemed timely when it is filed with the Clerk of this Court within 90 days after the entry of the judgment. The time for filing runs from the date the judgment sought to be reviewed is rendered, and not from the date of the issuance of the mandate. If a petition for rehearing is timely filed in the lower court by any party in the case, the time for filing the petition for a writ of certiorari runs from the date of the denial of the petition for rehearing or the entry of a subsequent judgment. Rule 13, Rules of the Supreme Court of the United States.

After the Sixth Circuit issued its April 28th ruling, Petitioner filed a "Petition for Rehearing En Banc." The Sixth Circuit apparently treated this as a petition for rehearing, rather than a suggestion for rehearing en banc, when it ordered the Clerk to enter the July 13 Order. July 13 should be the date which controls the running of the 90-day filing deadline.

On October 9, 1992, the Clerk of the Supreme Court returned to Petitioner 39 copies of its Petition "for failure to comply with this Court's Rules of Procedure." The Clerk instructed Petitioner as to the proper format to be used, referring Petitioner to various Rules of the Supreme Court. Petitioner never served Respondent with a copy of what was originally sent to the Clerk.

Respondent did not receive a copy of the Petition until October 21, 1992. The certificate of service signed by counsel for Petitioner states that the Petition was mailed

by regular U.S. mail on October 16, but the postmark demonstrates that it was mailed on October 20th, explaining why Respondent did not receive it until October 21st.

Petitioner misrepresented to the Court the actual date of service. October 16th was a Friday. On the assumption that the mail may have been in a mailbox over the weekend, the postmark still should have been for October 19, not October 20.

On October 29, Respondent received Notice from Petitioner that a Petition for Writ of Certiorari "was filed in the Supreme Court of the United States on the 8th day of October, 1992." The Petition served by Petitioner was signed by counsel for the Petitioner on October 16, 1992, ninety-five days after July 13.

The Questions Presented for Review go to the opinion of the Sixth Circuit dated April 28. Petitioner herein argues the same errors raised in its Petition for Rehearing En Banc at the appellate level, prior to and leading to the Sixth Circuit's July 13 corrective order.

Since Petitioner chooses to ignore the July 13 corrective order, and continues to attack the standard of review error of April 28, the ninety-day filing deadline should run from July 13. If so, the Petition is untimely and should be dismissed.

Service was improper.

Rule 29.3 of the Rules of the Supreme Court require that service is to be made "at or before the time of filing." Petitioner did not serve Respondent on October 8th, the alleged date of filing and did not serve Respondent on or

before October 16th, the date of signature contained on the Petition.

Rule 29.3 also requires that "three copies shall be served on each party." Petitioner only mailed one copy of the Petition for Writ of Certiorari to Respondent.

The Appendix is faulty.

Petitioner has presented an inaccurate reporting of the record below. The Appendix contains punctuation and typing errors. Words are left out, misspelled or inverted.

Several phrases are omitted from the District Court opinion at App. 60. A wrong date appears on App. 64.

Pages are out of order and do not accurately reflect the true opinions below. For example, App. 24 belongs after App. 11; App. 34 should be App. 33, and vice versa.

Because of these numerous deficiencies in the Petition, Respondent respectfully requests that this Court find that the Petition was not timely filed and served and that discretionary jurisdiction should not be exercised to issue a writ of certiorari.

CONCLUSION

Petitioner has not identified any special or important reasons for granting a writ of certiorari. The decision by the Sixth Circuit is supported by and consistent with Supreme Court and controlling law. The Sixth Circuit

corrected any errors which may have occurred in deciding the issues on appeal.

Petitioner is merely rearguing its view of the facts of this case. The facts contained in the trial record below do not substantiate the statement of facts as set forth by the Petitioner. Petitioner is also confused by the differing legal standards.

The Supreme Court should not issue a writ of certiorari to Petitioner in this case.

Respectfully submitted,

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